

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

*In the Matter of A.S. and the Centerville-
Abington Community Schools and East
Central Special Services*)) **Article 7 Hearing No. 1012-98**
))

The Student, through her parents, requested a due process hearing concerning issues of eligibility under Article 7,¹ the appropriateness of the educational evaluation and the Student's current program, and a denial of a free appropriate public education in violation of Article 7 and Section 504 of the Rehabilitation Act of 1973 (Sec. 504).² After eight days of hearing, the Independent Hearing Officer (IHO) rendered a written decision on May 18, 1998. Both the Student, through her parents, and the school have filed Petitions for Review.

BACKGROUND INFORMATION

The Student is 17 years old and at the time of the hearing was in her third year of high school, although she had not accumulated sufficient credits to qualify as a junior. She began having problems with her school work in first grade due to forgetfulness, inattention and disorganization. In the spring of her second grade year the Student's pediatrician began prescribing Ritalin. A Section 504 Plan was developed for the Student when she was in junior high school, with a report from the mother of a handicap of Attention Deficit Disorder (ADD). School work and behavior were satisfactory during this time. After an evaluation in November of 1994, the Student was found not to be eligible for services under Article 7. The parents did not challenge that determination.

The Student experienced problems during her freshman year of high school and a new 504 Plan was developed for her approximately six weeks into the school year. Although the Student performed better during the spring semester, she still failed three of her classes and attended summer school to make up some of the missed credits. She was evaluated for Learning Disabilities (LD) in April of 1996 but again was found ineligible for services under Article 7. The parents did not challenge that determination.

Academic problems persisted during the Student's sophomore year and the parents began to question the appropriateness of the school's accommodations and whether they were being implemented. The school reviewed the 504 Plan and reconvened the committee to make changes in the plan. The Student's performance improved under this plan during the 4th quarter of the school year.

¹511 IAC 7-3.

²29 U.S.C. § 794.

The Student's 504 committee reconvened at the beginning of the 1997-1998 school year, and some of the provisions of the previous 504 Plan were deleted. The Student's grades deteriorated and several committee meetings were convened. The parents requested an evaluation for a possible auditory processing disorder. The school completed part of the speech/language evaluation and initiated a psychological evaluation. The school also requested a copy of the independent testing done by the parents. A case conference committee meeting to address eligibility was not convened until January 23, 1998, after the parents had requested a due process hearing. The Student was not found eligible for services in any of the suspected categories: Communication Disorder, Learning Disabilities, Emotional Handicap or Other Health Impairment.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

On January 8, 1998, the parents filed a request for a due process hearing under Article 7. A prehearing conference was conducted by telephone on January 26, 1998. A prehearing order was issued as a result of this conference on February 6, 1998 indicating that the hearing would be held on February 24, 1998 and continue on February 25, 1998 if necessary. The parties agreed to pursue mediation and jointly moved to extend the decision deadline until March 16, 1998. The issues to be determined at the hearing were identified as follows:

1. Whether the child has a handicapping condition as defined in Article 7, and if so, the nature of that handicap;
2. If the child is found to have a handicapping condition, what educational program and related services, including medication dispensing, are needed to provide the child with a free appropriate education;
3. If the child is not found to have a handicapping condition as defined in Article 7, whether the child's current Plan under Section 504 provides her with appropriate educational accommodations that are being implemented by the respondents;
4. If the child's current Plan under Section 504 is not appropriate, to what modifications under Section 504 is the child entitled; and
5. Whether respondents violated the provisions of Article 7 by failing to convene a case conference committee meeting within 40 days of a speech and language evaluation performed in October 1997.

After the first two days of hearing, additional hearing dates of March 6, 7, 12, 19 and 20 and April 1³ were established. At the conclusion of the hearing, the parties were directed to submit posthearing briefs by April 27, 1998 and the parties agreed to extend the time for the rendering of a decision to May 11, 1998. Respondents subsequently requested additional time in which to file their brief. This motion was agreed to by the parents and was granted by the IHO, thereby extending the time for the decision to May 18, 1998.

An additional issue was added during the course of the hearing at the request of the

³The April 1 date was not needed as the hearing concluded on March 20, 1998.

parents.⁴ This issue was whether petitioners are entitled to reimbursement under Article 7 for independent testing. Also during the course of the hearing, the school requested the IHO to determine whether the Student was eligible under Sec. 504. The IHO determined that this issue had not been identified prior to the hearing and the issues as formulated and agreed to by the parties presume that the Student qualifies for services under Sec. 504. Therefore, the IHO concluded that the school had waived consideration of that issue.

On May 18, 1998, the IHO issued the written decision addressing the issues identified above. The IHO found the school utilized appropriate persons and test in their evaluations of the Student and considered the test results, information and opinions of outside experts. The Student is of average intelligence. Test scores are consistent with prior testing and with scores received in independent testing. The test results do not indicate severely discrepant scores on more than one test measure in any one relevant area. The testing shows achievement commensurate with the Student's intellectual ability. The Student has normal strength and vitality. The Student has been on medication for ADD intermittently since the spring of her second grade year. Testing of the Student during her high school years has occurred both while she was medicated for ADD and while she was not medicated. There was no evidence that the Student had problems with distractibility or problems with concentration during any of the testing. The Student's "freedom from distractibility index" was within normal limits. There was no demonstrable improvement in the Student's performance at school while she was taking medication for ADD and she experienced her greatest amount of academic success while she was not taking medication. Testing indicated few, if any, signs of hyperactivity and although the testing indicated problems maintaining attention, the scores did not rise to the level of clinical significance. The Student's performance has shown substantial variation and she performs substantially better where an activity she desires depends upon acceptable academic performance and homework is infrequently assigned. The Student requires more time to complete homework and to write down dictation and assignments than other students.

The Student performed poorly in three of four subtests within the SCAN test of auditory processing indicating a mild delay of auditory maturation and functional difficulties listening in an environment where the speaker's voice is distorted. The fourth subtest, measuring the ability to listen in the presence of background noise, revealed a score at the 95th percentile. The overall score was at the low end of normal limits. Overall, the evidence did not support a finding that the Student has significant difficulties in hearing or understanding oral language in the ordinary classroom situation.

⁴At the beginning of their case in chief, the parents requested the IHO determine whether the parents are entitled to attorney fees and reimbursement for independent testing. Respondents objected to the addition of new issues on the grounds of waiver and surprise. The IHO declined to rule on the issue of attorney fees but agreed to take the matter of reimbursement for testing under advisement. The IHO subsequently decided to render a decision on the issue of reimbursement for independent testing to avoid further litigation on that issue.

No symptoms of anxiety, depression or other emotional disturbance are displayed by the Student at school. The Student's behavior is appropriate and she has friends and involves herself in school and social activities with them. The Student's therapist (certified social worker) has diagnosed the Student as having an Adjustment Disorder, Anxious and Depressed Mood and as having Attention Deficit Disorder based upon information given to her by the parents and Student. The therapist has had no contact with school personnel. The clinical psychologist approving the therapist's diagnosis and treatment plan did not personally evaluate the Student. The physician prescribing medication for the Student relied on information provided by the therapist and a nurse practitioner and did not personally evaluate the Student. The evidence indicated that the parents and Student have not made full and accurate disclosure to the therapist relating to the Student's functioning at school and home.

Until this hearing was underway, the school has never unequivocally challenged the parents' assertion that the Student is a student with a disability. The parties have met on numerous occasions and have added, modified, deleted and reinstated various provisions to the Student's Sec. 504 Plan. The school has actively solicited suggestions from the parents and have written many of the suggestions from the parents or their outside experts into the Student's Sec. 504 Plan. Subtle changes in the Plan have not always been implemented immediately and some teachers continue to offer accommodations that are no longer listed in the Plan. Certain provisions of the Plan are discretionary or subject to differing interpretations. The teachers have used good-faith judgment in interpreting Plan provisions. The teachers and the school are in substantial compliance with the Plan as written and reasonably interpreted.

The parents are aware that the Student is unwilling or unable to accurately inform them of schoolwork which is not finished and is not always truthful regarding school assignments. The parents are also aware that school assignments not finished in class are not usually completed and turned back in. The parents have not contacted the teachers for assistance in identifying the missing assignments. It has been the position of the parents that the Student is not able to avail herself of the accommodations in place for her by reason of her disability. The Student has shown that she is aware of the help that is available to her and can make use of it. The Sec. 504 Plan currently in effect is designed to meet the perceived needs of the Student. The Student and parents have failed to effectively utilize the accommodations in place.

The school's general policies regarding Alternative Learning Times, academic probation, learning contracts and general disciplinary matters are reasonably aimed at modifying student behavior and are not unreasonable. The school's general policy concerning the dispensing of medication is that students needing medication will independently report to the office for the dispensing of the medication. The Student has not done this. The parents were aware that the Student was not receiving her medication but did not ask the school to make an exception to its policy. The parents have discussed matters concerning the Student with the Superintendent and based on their accounts of these meetings, the parents have no reasonable grounds to believe the school was unwilling to consider and make an appropriate exception to the school policy concerning medication.

The school did not convene a case conference committee meeting within 40 instructional days of parental permission for a speech and language evaluation. The delay was attributed to a

number of factors: (a) failure of the speech and language pathologist to administer appropriate and complete testing in a timely manner; (b) failure of the parents to provide the school with a written report of independent testing; (c) parents consented to a psycho-educational evaluation which was relevant to a case conference committee decision and was still within its 40 day period; and (d) illness of the Student and parental preference that the school complete their testing after the holiday break.

Two Section 504 Plans from 1997 contain a provision that the parents are to seek the appropriate authority (doctor, specialist) to give a new diagnosis of possible problem. While the parents had reported that the Student was being treated for depression, they did not provide the school with any reports or release any information from the therapist regarding those diagnoses or the Student's treatment plan. The school had previously completed psycho-educational evaluations of the Student in 1994 and 1996. The results of these evaluations were substantially similar and the parents did not question the adequacy or accuracy of the testing. The parents contracted for an evaluation at an independent center without prior notice to the school or a request that they pay for the testing. The testing done was substantially similar to the testing performed by the school and yielded substantially similar results. The test results, in draft form, were available to the parents in November, but they did not provide the results to the school until shortly before the hearing. Although the center tested for ADD, the school has never received any recommendations regarding ADD from the center. The testing done by the center was not for diagnostic purposes but for the parents' purposes only.

Based upon the foregoing facts, the IHO made the following conclusions of law. All testing indicated that the Student's achievement is commensurate with her potential. The Student is not eligible for services under Article 7 by reason of a learning disability. Testing and observation indicate the Student demonstrates a degree of alertness within normal limits and comparable to that of her peers. Subjective difficulties reported by the Student, when considered with all other relevant evidence, do not establish a chronic or acute health problem that is adversely affecting the Student's education performance. The Student is not eligible for services by reason of an other health impairment. When sufficiently motivated, the Student can and does complete assignments, pass tests, and otherwise do what is expected of her. She engages in normal school learning activities, and when monitored by her parents at home, she can and does complete her assignments and produce acceptable work. The Student does not show signs of significant emotional interference with behaviors and attitudes essential to her learning processes and is not eligible for services under Article 7 by reason of an emotional handicap.

The issue of whether the Student is a Student with a disability for the purpose of Section 504 was not identified prior to the hearing. The issues as formulated presume the Student qualifies under Section 504. The school's long-standing position in dealing with the Student and parents has been that the Student is a student with a disability under Section 504. The school has waived consideration of the issue, and by its conduct is estopped from denying the Student status as a student with a disability under Section 504. Section 504 prohibits discrimination on the basis of disability. The school has not discriminated against the Student in the formulation or implementation of the Sec. 504 Plan. The school has not discriminated against the Student in its application of school policies concerning discipline, academic probation, mandatory after-school homework sessions, learning contracts or medication.

While the school did not convene a case conference committee meeting within 40 instructional days of parental consent, this violation did not amount to a denial of a free appropriate public education. The course of conduct⁵ between the parties led the school to reasonably believe the parents were waiving the 40-day rule.

The parents failed to notify the school that they objected to the completeness or accuracy of the school's testing; that they would be seeking an independent evaluation substantially similar to the school's prior testing; and that the parents were seeking reimbursement. The school's evaluations were appropriate. The parents are not entitled to reimbursement.

Based on the above findings of fact and conclusions of law, the IHO issued no orders. The IHO did attach a Student Accommodation Plan to the decision and suggested the parties adopt a plan substantially similar to the one appended to the decision.

PROCEDURAL HISTORY OF THE APPEAL

Both parties requested, and were granted, an extension of time in which to file their petitions for review until July 17, 1998. On July 17, 1998, both parties filed their Petitions for Review. Both parties also requested extensions of time in which to file a reply to the other party's petition for review and were granted extensions until August 27, 1998. The Board of Special Education Appeals (BSEA) scheduled this matter for review without oral argument for September 10, 1998 with the final written decision to be rendered by September 30, 1998.

Parents' Petition for Review

The parents have objected to Findings of Fact 1.1 through 1.41, 3.1 through 3.24, 5.1, 5.2, and 6.1 through 6.10 and Conclusions of Law 1.1 through 1.6, 3.1 through 3.7, 5.1 and 6.1 as being arbitrary and capricious, an abuse of discretion, contrary to law and the Indiana and United States Constitutions, reached in violation of established procedure and unsupported by substantial evidence. The parents have objected to the conduct of the IHO which they argue compromised the impartiality of the IHO. This conduct included extensive cross-examination which was designed to elicit testimony favorable to the school, requesting or accepting evidence which was not disclosed at least 5 business days prior to the hearing, and requesting the introduction of "IHO Exhibits" indicating the IHO had a duty to develop the evidence. The parents argue that the evidence and testimony indicate the Student should be found eligible for services under Article 7 as a student with an emotional handicap, a communication disorder, a learning disability and as a student with an other health impairment. The parents further argue that the school violated IDEA, Article 7 and Sec. 504 by failing to ensure that prescribed medication was properly dispensed to the Student and violated Sec. 504 by failing to provide a free appropriate education.

⁵The parents intended to share the results of their outside evaluation with the school, which had a statutory duty to consider such report. Further, the parents subsequently consented to a psycho-educational report, which the school was also obliged to consider.

School's Response to Parents' Petition for Review

In its response, the school argues that the IHO correctly found: (1) the Student does not qualify for special education and related services under Article 7 as a student with a learning disability, an emotional handicap, a communication disorder or other health impairment; (2) the Student's current Sec. 504 Plan provides for a free appropriate public education (FAPE), the school properly implemented the Sec. 504 Plan, and the school did not discriminate against the Student on the basis of disability; (3) the school did not deny the Student a FAPE when it failed to convene the case conference committee meeting within 40 instructional days of receiving written parental consent for the speech/language evaluation; and (4) Petitioners are not entitled to reimbursement for independent testing. The school also argues that the IHO did not violate Petitioners' due process rights in the conduct of the hearing.

School's Petition for Review

The school argues that the IHO erred in determining that the Student's eligibility under Sec. 504 was not an issue in the hearing and erred in not finding the Student ineligible under Sec. 504. The school objects to Findings of Fact 3.1, 6.4 and 6.5 and Conclusions of Law 3.1 and 3.2 as not being supported by the IHO's decision, evidence of record or applicable law in violation of 511 IAC 7-15-6(k)(3)(6) and as being arbitrary and capricious. The school also argues that the IHO erred as a matter of law, abused her discretion and exceeded her jurisdiction by attaching a "Proposed Student Accommodation Plan." As relief, the school asks the BSEA to strike the first sentence and amend FF 3.1, amend FF 6.4, strike FF 6.5, strike and replace CL 3.1, strike and replace CL 3.2 and to strike the "Appendix: Proposed Student Accommodation Plan."

Parents' Reply to School's Petition for Review

In their reply to the school's petition for review, the parents argue that the school has waived its right to challenge the Student's eligibility under Sec. 504. The parents maintain there is substantial and uncontradicted evidence in the record indicating the Student has been diagnosed and treated for ADD since 1989. Finally, the parents argue that the inclusion of a suggested student accommodation plan was not error by the IHO. Rather, the parents maintain that the inclusion of the suggested student accommodation plan illustrates that the IHO erred in determining that the Student's current Sec. 504 Plan was appropriate.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

On August 19, 1998, the parties were advised that one of the Board members has a daughter employed by the school. The daughter has not been involved with the Student or involved in any of the issues under appeal. The parties were afforded the opportunity to file objections to the participation of this Board member or a motion for recusal. No objections or motions concerning this matter were filed by either party.

The Indiana Board of Special Education Appeals met on September 10, 1998, to conduct its review of the above-referenced matter. All members were present and had reviewed the record, the parents' and school's Petitions for Review and the parents' and school's Responses.

The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
2. Although written evidence was admitted during the course of the hearing that had not previously been disclosed to the other party as required by 511 IAC 7-15-5(j)(3), no prejudice to either party has been demonstrated. The IHO did not commit any procedural error.
3. The IHO did not commit any procedural error by questioning the witnesses. This is within the discretion of the IHO. There was no showing of any abuse of this discretion.
4. The IHO did not compromise her impartiality by requesting that documents be submitted into evidence and designating them as IHO exhibits. These documents were requested by the IHO to help clarify or explain a witness' testimony when the witness testified from or about a particular document. No prejudice has been demonstrated. There was no showing of any abuse of the IHO's discretion.
5. Although the IHO made a perhaps unfortunate or inappropriate comment at the start of her questioning of the Student's mother, this isolated incident is insufficient to show any bias or prejudice on the part of the IHO.
6. Five issues had been identified and agreed to by the parties before the start of the hearing. These issues as identified presumed that the Student was a qualified student with a disability for purposes of Sec. 504. The school has waived consideration of the issue of whether the Student is a student with a disability pursuant to Sec. 504.
7. The Student's past and present tests do not indicate severely discrepant scores on more than one test measure in any one relevant area which would qualify the Student for special education interventions by the school.
8. No evidence in the record indicates that any physician currently or recently prescribing medication for the Student has performed any diagnostic assessment for Attention Deficit Disorder (ADD).
9. The Student's therapist, a certified social worker, is not qualified to make a psychological diagnosis.
10. The evidence was insufficient to support a finding in FF 3.13 that the failure of the parent and Student to effectively utilize accommodations has deprived the school of feedback.
11. Findings of Fact 6.4 and 6.5 are based upon assumptions and speculation.

12. Conclusion of Law No. 1.2 refers to the Indiana Procedural Guidelines (1994).⁶ These procedural guidelines are not statutes, rules or regulations, and there is no evidence that these guidelines have been published in the Indiana Register such that the guidelines can be used as a legal standard.

13. While the IHO's findings of fact do indicate some disparity in the information provided by the parents to the therapist, the BSEA determines that this is insufficient to conclude, as a matter of law, that the therapist based her opinions and recommendations on inaccurate and incomplete information.

14. The Accommodation Plan attached as an appendix to the IHO's decision was offered by the IHO to the parties as a suggestion only, and not an order. However, the IHO has found, as does the BSEA, that the Student's current Section 504 Plan is appropriate. The Accommodation Plan offered by the IHO is superfluous and confusing to the parties and should be struck.

15. Typographical and grammatical errors should be corrected.

All votes by the BSEA regarding the above were voice votes and were unanimous.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. Finding of Fact 1.4 is amended to read as follows:

In isolated subtests, the child demonstrates performance scores which are significantly discrepant with her expectancy score. Her past and present tests do not indicate severely discrepant scores on more than one test measure in any one relevant area which would qualify her for special education interventions by the school.

2. Finding of Fact 1.5 is amended to read as follows:

The child's grades and portions of standardized tests measuring broad knowledge indicate that she is not mastering educational concepts at a level commensurate with her ability.

3. Finding of Fact 1.8 is amended to read as follows:

There is no evidence that any physician currently or recently prescribing medication for the child has performed any diagnostic assessment for Attention Deficit Disorder (ADD).

4. Finding of Fact 1.10 is amended to read as follows:

During the time she has attended high school, the child has been tested on numerous occasions by the Respondents and independent persons. She has undergone testing while being medicated for Attention Deficit Disorder and when unmedicated. The child's "freedom from distractibility index" was within normal limits on tests which rated that

⁶The Indiana Procedural Guidelines (1994) are no longer in use.

factor.

5. Finding of Fact 1.26 is amended to read as follows:
None of the persons who performed other testing on the child noted that she had any significant difficulty in attending to, hearing, understanding or following test directions.
6. Finding of Fact 1.34 is amended by replacing “has diagnosed” with “reported.”
7. Finding of Fact 1.35 is amended by replacing “diagnoses” with “judgments.”
8. Finding of Fact 1.36 is amended by replacing “assessments and diagnosis” with “judgments.”
9. Finding of Fact 1.37 is amended by replacing “diagnosis” with “judgment.”
10. Finding of Fact 3.13 is amended to read as follows:
The 504 Plan currently in effect is designed to meet the perceived needs of the child in a reasonable fashion.
11. Finding of Fact 6.4 is amended to read as follows:
Regarding the Plan provision that the parents “Seek . . . a new diagnosis,” the parents state that the school, when asked to clarify the provision, requested recommendations regarding Attention Deficit or information regarding the child’s anxiety disorder or a learning disability. (4B TR 428)
12. Finding of Fact 6.5 is deleted and Findings of Fact 6.1 through 6.10 are renumbered as 6.1 through 6.9 to reflect this deletion.
13. The first paragraph of Conclusion of Law 1.2 is amended to read as follows:
Article Seven requires that a communication disorder adversely affect the child’s educational performance.
14. Conclusion of Law 1.3 is amended to delete the word “all” from the beginning of the second paragraph.
15. Conclusion of Law 1.5 is amended to read as follows:
An emotional condition must consistently interfere with a student’s learning process to a marked degree in order to be considered an Emotional Handicap under Article Seven.
The diagnosis and opinions of a mental health professional are not determinative.

When sufficiently motivated (by either positive or negative consequences) the child can and does complete assignments, pass tests, and otherwise do what is expected of her. During the school day she usually engages in behaviors consistent with normal learning processes: she attends class, follows along with class activities and produces work of at least adequate quality. When monitored by her parents at home, she can and does complete her assignments and produces acceptable work. The child does not show signs of significant emotional interference with behaviors and attitudes essential to her school

performance. For this reason, the child is not eligible for services under Article Seven by reason of an Emotional Handicap.

16. The appendix, which includes the Accommodation Plan, is struck.
17. The IHO Orders section is amended to read as follows:
In light of the foregoing Findings of Fact and Conclusions of Law, no orders will be issued.
18. Typographical or grammatical changes to the IHO decision are made as follows:
 - a. FF 1.13: Delete “of” in first line.
 - b. FF 1.18: Correct spelling of “academic.”
 - c. FF 1.19: Insert “a” after “As” in the second sentence.
 - d. FF 3.5: Change “nor” to “no” in the second sentence.
 - e. FF 3.9: Delete “work” in the first sentence.
 - f. FF 3.21: Change “student’s” to “students” and change “he” to “the.”
 - g. CL 1.3: In the last sentence of the first paragraph, correct the spelling of “between” and delete the “s” from “scores.”
 - h. CL 1.6: Delete the apostrophe from “Respondent’s.”
 - i. CL 3.3: Delete “are met” at the end of the first paragraph.
 - j. CL 3.5: Insert “the” between “in” and “way” in the fifth line.
 - k. CL 6.1: Change “establishes” to “established.”
19. The decision of the IHO is upheld in all other respects.
20. All other Motions not specifically addressed herein are hereby deemed denied.

Date: September 16, 1998

/s/ Raymond W. Quist, Ph.D.
Raymond W. Quist, Ph.D., Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).